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U.S. DISTRICT COURT

2009 MAY -6 P 3:58

DISTRICT OF UTAH

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Attorneys for Receiver

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

SECURITIES AND EXCHANGE COMMISSION, **Plaintiff,** **v.** **VESCOR CAPITAL CORP., et al.,** **Defendants.**	~~**PROPOSED**~~ **FOURTH PAY ORDER** **Case No. 1:08CV00012** **Judge: Dee Benson**

WHEREAS this Court appointed Mr. Robert G. Wing the Receiver for defendant Vescor Capital on May 5, 2008, and

WHEREAS the Receiver, by Fourth Declaration of Receiver dated May 5, 2009, seeks payment of the reasonable fees and expenses incurred by him, his associates at Prince, Yeates & Geldzahler and PricewaterhouseCoopers, LLP as permitted under Section II(h) of the Order Appointing Receiver for Vescor Capital, and the Order Approving Gil Miller and his colleagues of PricewaterhouseCoopers, LLP as Accountants

for Receiver dated May 5, 2008 it is, hereby,

ORDERED that the Fourth Declaration of Receiver dated May 5, 2009, is accepted and approved, and it is further

ORDERED that the Receiver may, pursuant to paragraph II(h) of the Order Appointing Receiver for Vescor Capital pay from the assets of Vescor Capital or the receivership estate the invoices of the Receiver and his associates at Prince, Yeates & Geldzahler dated thru March 31, 2009, for reasonable fees and expenses totaling $316,017.92, the invoice of PricewaterhouseCoopers, LLP dated thru March 31, 2009 for reasonable fees and expenses totaling $92,475.

Dated this 6th day of May, 2009.

BY THE COURT:

Dee Benson

HONORABLE DEE BENSON
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of May, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which sent notification of such filing to the following:

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/s/ Michelle T. Henderson

FILED
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2009 MAY -6 P 4:45
DISTRICT OF UTAH
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Attorneys for Receiver

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

SECURITIES AND EXCHANGE COMMISSION, **Plaintiff,** **v.** **VESCOR CAPITAL CORP., et al.,** **Defendants.**	~~**PROPOSED**~~ Amended **FOURTH PAY ORDER** **Case No. 1:08CV00012** **Judge: Dee Benson**

WHEREAS this Court appointed Mr. Robert G. Wing the Receiver for defendant Vescor Capital on May 5, 2008, and

WHEREAS the Receiver, by Fourth Declaration of Receiver dated May 5, 2009, seeks payment of the reasonable fees and expenses incurred by him, his associates at Prince, Yeates & Geldzahler and PricewaterhouseCoopers, LLP as permitted under Section II(h) of the Order Appointing Receiver for Vescor Capital, and the Order Approving Gil Miller and his colleagues of PricewaterhouseCoopers, LLP as Accountants

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ORDERED that the Receiver may, pursuant to paragraph II(h) of the Order Appointing Receiver for Vescor Capital pay from the assets of Vescor Capital or the receivership estate the invoices of the Receiver and his associates at Prince, Yeates & Geldzahler dated thru March 31, 2009, for reasonable fees and expenses totaling $316,017.92, the invoice of PricewaterhouseCoopers, LLP dated thru March 31, 2009 for reasonable fees and expenses totaling $105,451.63.

Dated this 6th day of May, 2009.

BY THE COURT:

Dee Benson

HONORABLE DEE BENSON
United States District Judge

CERTIFICATE OF SERVICE

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/s/ Michelle T. Henderson

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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, NORTHERN DIVISION

UNITED STATES OF AMERICA,	:	Case No. 1:08 CV 00156 CW
Petitioner,	:	
v.	:	ORDER TO SHOW CAUSE
LORRI E. THURGOOD,	:	
Respondent.	:	

On the 18th day of February and 7th day of April, 2009 the Respondent was to appear before the United States Magistrate Judge David Nuffer regarding the United States' Petition to Enforce Internal Revenue Summons ("Petition"). Ms. Thurgood did not appear. Therefore,

IT IS HEREBY ORDERED that Respondent Lorri E. Thurgood shall appear before the United States District Court for the District of Utah, Central Division, presided over by United States Magistrate Judge David Nuffer, in his Courtroom, Room 477 U.S. Courthouse, 350 South Main Street, Salt Lake City, Utah, on the 10th day of June, 2009 at 9:00 a.m., to show cause why: (1) a warrant should not be issued for her ARREST for her failure to appear before this Court on February 18, and April 7, 2009; (2) she should not be held in CONTEMPT OF COURT for failing to appear before this Court on February 18 and April 7, 2009; and (3) she should not be compelled to testify or to produce the information required and called for in the

Petition by the terms of the Internal Revenue Service summons (including attachments thereto) directed to and served upon her.

The Magistrate Judge will decide whether to issue a bench warrant and whether to hold Ms. Thurgood in contempt for failure to appear. The Magistrate Judge will also hear the evidence and make a written recommendation to the district court judge assigned to this case for a proper disposition of the Petition.

IT IS FURTHER ORDERED that the United States Marshal or any Internal Revenue Service employee shall: (1) attempt to personally serve a copy of this Order together with the petition and exhibits thereto upon Respondent pursuant to Rule 4 of the Federal Rules of Civil Procedure; (2) send a copy of this Order, the petition, and exhibits to Respondent by certified mail, return receipt requested; (3) send a copy of this Order, the petition, and exhibits to Respondent by regular first class mail, postage prepaid; (4) send a copy of this Order, the petition, and exhibits to Respondent by regular first class mail, postage prepaid, to Respondent's parents.

IT IS FURTHER ORDERED that within ten days after service of copies of this Order, the petition and exhibit attached thereto, Respondent shall file and serve a written response to the Petition, supported by appropriate sworn statements, as well as any motions he desires to make. All motions and issues raised by the pleadings will be considered on the return date of this Order.

Only those issues raised by motion or brought into controversy by the responsive pleadings and supported by sworn statements and filed within ten days after service of the herein described documents will be considered by the Court. All allegations in the petition not contested by such responsive pleadings or by sworn statements will be deemed admitted.

If Respondent, prior to the return date of this Order, files a notice of no opposition to this Order, stating that he does not oppose the relief sought in the petition nor wish to make an appearance, then the appearance of Respondent at any hearing held pursuant to this Order to Show Cause is excused. However, unexcused failure to appear will result in a warrant for Respondent's arrest.

DATED this 6th day of May 2009.

BY THE COURT:

DAVID NUFFER, Magistrate Judge
United States District Court

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2009 MAY -6 A 10:41
DISTRICT OF UTAH
BY:

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, NORTHERN DIVISION

LL, a minor, by and through her Father and Guardian ad Litem, ANDY LYON Petitioner, vs. LOGAN RIVER ACADEMY, LLC; and DOES 1 through X, Respondents.	**ORDER ADOPTING REPORT AND RECOMMENDATION** Case No. 1:09-cv-0029 CW District Judge Clark Waddoups Magistrate Judge David Nuffer

This case was assigned to United States District Court Judge Clark Waddoups, who then referred it to United States Magistrate David Nuffer under 28 U.S.C. § 636(b)(1)(B). On March 16, 2009, the Magistrate Judge issued a Report and Recommendation, recommending that Logan River Academy, LLC's Motion to Dismiss be granted. LL timely filed an objection to the Report and Recommendation on March 26, 2009. After having reviewed the file *de novo*, the court hereby APPROVES AND ADOPTS the Magistrate Judge's Report and Recommendation in its entirety. Accordingly, Logan River Academy, LLC's Motion to Dismiss is GRANTED.[1]

SO ORDERED this 5th day of May, 2009.

BY THE COURT:

Clark Waddoups
United States District Judge

[1] Docket No. 5.

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

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2009 MAY -6 A 10:41
DISTRICT OF UTAH
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SUMMUM, a corporate sole and church, Plaintiff, vs. DUCHESNE CITY, a governmental entity; et al., Defendants.	ORDER Case No. 2:03-CV-1049

For reasons of judicial economy, IT IS ORDERED that this case be transferred to Judge Dale A. Kimball.

IT IS SO ORDERED this 5th day of May, 2009.

BY THE COURT:

Tena Campbell

TENA CAMPBELL
Chief Judge

Case: 2:03cv01049
Assigned To : Kimball, Dale A.
Assign. Date : 5/6/2009
Description: Summum v. Duchesne Cty, et al

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U.S. DISTRICT COURT

2009 MAY -6 A 10:41

DISTRICT OF UTAH

BY:_____
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Attorneys for Barry Stone

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

HERBERT WHITBY SMITH, Plaintiff, vs. CLINT FRIEL, et al., Defendants.	**ORDER OF DISMISSAL WITH PREJUDICE** Case No. 2:05CV78 Judge Clark Waddoups Magistrate Judge Samuel Alba

Based upon the Stipulation and Joint Motion for Dismissal of All Claims With Prejudice entered into between Plaintiff Herbert Whitby Smith, and Defendants, Barry Stone, Terry Jeffries, Larry Kraiss, Jamie Troyer, Clint Friel, Mike Chabries, Scott Carver, Richard Gardner, Vita Betts, Michael Rollins, and Gregory Stroup, it is hereby ORDERED, ADJUDGED AND DECREED that Plaintiff's Complaint, and all claims contained therein, is dismissed with prejudice, with the parties to bear their own costs and fees.

DATED this 5th day of May, 2009.

BY THE COURT:

The Honorable Clark Waddoups
District Court Judge

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA,	:	Case #2:05CV00533 TS
Plaintiff,	:	JUDGMENT OF FORFEITURE
v.	:	AS TO DEFENDANT PROPERTIES:
East Nottingham Way, Salt Lake City, Utah, et al.,	:	$140,000.00 in lieu of Real Property located at [Redacted] Collins Avenue,
Defendants.	:	#1119, Miami Beach, Florida; and $80,000.00 in lieu of Real Property
	:	located at [Redacted] SW 66 Street, #512, El Doral, Florida
	:	JUDGE: Ted Stewart

IT IS HEREBY ORDERED AND ADJUDGED that:

Order of Forfeiture be entered and the same is entered in the above-captioned case against all persons and entities with respect to the defendant properties identified as:

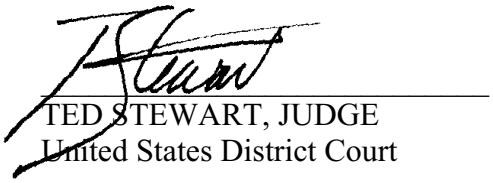
- $140,000.00 in lieu of Real Property located at [Redacted] Collins Avenue, #1119, Miami Beach, Florida
- $80,000.00 in lieu of Real Property located at [Redacted] SW 66 Street, #512, El Doral, Florida

//this space left blank intentionally//

The assets identified above are forfeited to the United States, with all right, title, and interest vested in the United States, and any interest of any person or entity in said assets is forever barred.

SO ORDERED, DATED this 6th day of May, 2009.

BY THE COURT:



TED STEWART, JUDGE
United States District Court

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U.S. DISTRICT COURT

2009 MAY -6 A 10: 41

DISTRICT OF UTAH

BY:_____
DEPUTY CLERK

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

DIMITRE ASSENOV Plaintiff, v. THE UNIVERSITY OF UTAH; MELINDA P. KRAHENBUHL; DAVID SLAUGHTER; AND DOES 1 through 5. Defendants.	**ORDER OF DISMISSAL WITH PREJUDICE** Case No. 2:05-CV-1030 TC Judge Clark Waddoups Magistrate Judge David Nuffer

Based upon the Stipulation and Joint Motion for Voluntary Dismissal With Prejudice entered into between Plaintiff Dimitre Assenov and Defendants University of Utah, Melinda P. Krahenbuhl and David Slaughter, it is hereby ORDERED, ADJUDGED AND DECREED that Plaintiff's complaint against these defendants is dismissed with prejudice, with the parties to bear their own costs.

SO ORDERED this 5th day of May, 2009.

BY THE COURT:

Judge Clark Waddoups
United States District Court Judge

APPROVED AS TO FORM AND CONTENT:

/s/ Kenneth B. Grimes
KENNETH B. GRIMES
Attorney for Plaintiff
(Signed by Filing Attorney with permission of Kenneth B. Grimes)

FILED
U.S. DISTRICT COURT
2009 MAY -6 A 11:50
DISTRICT OF UTAH
BY: DEPUTY CLERK

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Attorneys for Defendant e.Digital Corporation

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

DIGECOR, INC., a Washington corporation,

Plaintiff

vs.

E.DIGITAL CORPORATION, a Delaware corporation;

Defendant.

PRETRIAL ORDER

Case No. 02:06-CV-00437 CW

Judge Clark Waddoups

This matter having come before the Court on April 30, 2009, at a pretrial conference held before the Honorable Clark Waddoups, pursuant to Fed. R. Civ. P. 16, and David W. Tufts and Erin T. Middleton having appeared as counsel for plaintiff digEcor, Inc. ("digEcor"), and

Samuel C. Straight and Ryan B. Bell having appeared as counsel for defendant e.Digital Corporation ("e.Digital" or "Defendant"), the following action was taken:

1. **JURISDICTION:** This is an action for breach of contract and related relief with respect to the delivery of goods and services by defendant e.Digital to plaintiff digEcor. The Court has original jurisdiction over the subject matter of this action under 28 U.S.C. § 1332(a) because there is complete diversity of citizenship between plaintiff digEcor, a Washington corporation having its principal place of business in Springville, Utah, and defendant e.Digital, a Delaware corporation having its principal place of business in San Diego, California. The amount in controversy exceeds the sum or value of $75,000 as demanded in digEcor's Amended Complaint (dkt 84). The jurisdiction of the Court is not disputed and is hereby determined to be present.

2. The Court finds that it has jurisdiction over the person of defendant e.Digital pursuant to Utah Code Ann. § 78B-3-205(1) because e.Digital has engaged in the transaction of business within this state as defined in Utah Code Ann. § 78B-3-202(2). The Court further finds that it has jurisdiction over the person of e.Digital pursuant to Utah Code Ann. § 78B-3-205(2) because e.Digital contracted to supply goods or services to digEcor in this state. e.Digital does not contest this Court's exercise of jurisdiction over its person in this matter.

3. Defendants William Blakeley and Fred Falk, individuals residing in the state of California, have been dismissed with prejudice by stipulation of the parties (dkt 347).

4. **VENUE:** The parties do not contest the venue of this action. Venue is found to be proper in the Central Division of the District of Utah, sitting in Salt Lake City, Utah, pursuant to 28 U.S.C. § 1391(a)(2) and 28 U.S.C. § 125(2).

5. **GENERAL NATURE OF THE CLAIMS OF THE PARTIES:**

A) **digEcor's Claims:**

B) This section contains digEcor's position as to its claims. e.Digital disputes all of the claims and many of the factual assertions set forth below.

(1) digEcor's Claims based on e.Digital's Breaches of the PO.

(i) *e.Digital Breached the PO by Failing to Deliver Batteries.*

The Court held on March 13, 2009, e.Digital breached the PO by failing to deliver the 1,250 Li-Ion batteries that digEcor ordered and paid for pursuant to the PO. Order and Memorandum Decision, March 13, 2009, p. 19 (dkt 324). The Court granted summary judgment for digEcor, holding digEcor is entitled to recover the purchase price that digEcor paid e.Digital for these batteries ($80,000.00). The Court also said, to the extent digEcor also seeks consequential damages on the failure to deliver the batteries, this is a factual issues to be determined at trial. *Id.* 19 & 23 ("Consequential damages as a result of this breach are a factual question").

(ii) *e.Digital Breached the PO by Failing to Build or Deliver Players.*

e.Digital breached the PO by failing to have the 1,250 players built and ready for shipment on January 10, 2006, as required by the PO, consistent with the parties' course of dealings on prior orders. e.Digital further breached the PO when it delayed, for the better part of one year, the delivery of the 1,250 players to digEcor even though digEcor had paid in full, provided branding information in February, and specifically requested that the players be encased in their shells and delivered. It takes no more than 6 weeks to manufacture these players. digEcor was relying on e.Digital for timely performance—digEcor has no alternative source of supply for these players. e.Digital will not give digEcor the technical documentation necessary to allow digEcor to have the players manufactured itself.

On this and prior orders, it was the express agreement and course of performance between the parties that digEcor would place an order for players that digEcor anticipated it could sell to airlines, and pay for the manufacturing up front, so that e.Digital could build the players to completion *minus* only their shells that would bear the colors and logos of the airline customer as soon as digEcor learned the airline color by closing a sale. e.Digital promised for this order—as it had done on similar orders—that it would build the sub-assemblies to completion and then it would take no more than 3 to 4 weeks from the time digEcor provided branding information to procure the plastic shells, encase the finished sub-assemblies, and deliver the units to digEcor. This mechanism permitted the inventorying of players that digEcor could offer for sale to airlines under a firm commitment to meet the airline's delivery expectations. Airlines require firm delivery commitments.

Consistent with its expectation that the players would be finished on time and only awaiting shells, digEcor paid the two initial 25% installments ($198,437.50 each) when due on

November 15 and December 9, 2005. The final installment (totaling $396,875.00) was due under the PO on January 10, 2006, the specified completion date. Before this installment became due, e.Digital asked digEcor to pay $100,000 of the total early to help e.Digital cover its payroll, which digEcor did on December 23, 2005. On January 10, 2006, digEcor paid the remaining balance due, but retaining $50,000 to finished the shells and $13,250 as an offset of another debt.

On February 21, 2006, after securing commitments from airlines to lease the players, digEcor requested e.Digital encase the players in their shells and ship them to digEcor. e.Digital said that it would do so but required immediate payment of the $50,000 holdback for shells and the $13,250 holdback in order to ship the product, which digEcor paid immediately. At e.Digital's request, digEcor paid the $50,000 directly to e.Digital's Korean manufacturer, but paid the $13,250 holdback, which digEcor felt was a valid debt, directly to e.Digital "under protest." At the same time digEcor stated its intention to order the remaining 750 players, or, as expressed in email, maybe as many as "850 to 1000 more of the current players." But e.Digital failed to perform on the 1,250 order. Shortly after requesting the additional players, e.Digital informed digEcor that e.Digital would not be performing under the PO because its subcontractor of the sub-assemblies had encountered financial difficulties.[1]

e.Digital eventually tendered the 1,250 players for delivery beginning in late-October and finishing with the majority of the players delivered to digEcor's headquarters in Springville, Utah, in November 2006; eleven months beyond the original January 10 completion date. digEcor accepted this tender because it needed these players to sustain its business. During the better part of that entire year, until November, digEcor had no new players to sell and generate content revenue, and suffered substantial losses as a result. The evidence will show that digEcor had contracts or commitments from Virgin Blue and Aeroflot valued at more than $714,000 that were lost as the direct result of e.Digital's late delivery of these players. Further, the evidence will show that not having these players available until November, and being unable to acquire the additional 750 units, or any other 5500 players at all, has caused digEcor to suffer additional consequential damages of $1.4 million during 2006, $1.8 million during 2007, $2.9 million during 2008, and $2.2 million during the first half of 2009, and damages incurred thereafter.

digEcor has undertaken every effort to mitigate the damages it has suffered from not having these players. For example, digEcor purchased used digEplayer 5500s from airlines in bankruptcy and refurbished them in new shells. digEcor also abandoned its plans to develop an "embedded" system that was intended its expand digEcor's offerings in the IFE market (the "digEsystem"), and has attempted at great expense to develop a replacement stand alone offering (the "digEplayer XT") to fill the void created by the loss of its legacy product, the digEplayer 5500.

(2) digEcor's Claim based on e.Digital's Breach of the Digital Rights Management Agreement

The Digital Rights Management Agreement (the "DRM Agreement") governs the terms of e.Digital's provision of digital rights management technology to digEcor. In connection with

[1] A different company is the plastics supplier who is used to make the colored shells. There is no evidence of record of any financial difficulty on the part of the plastics supplier.

e.Digital's agreement to develop and deliver to digEcor this DRM software, for a one time fee of $25,000, e.Digital granted to digEcor "an unrestricted, unlimited, irrevocable right to use the DRM technology for use on the DIGECOR digEplayer and other DIGECOR products, including the right to modify and add to the DRM technology at DIGECOR's discretion." DRM Agreement, ¶ 2. The parties further agreed that digEcor would have the exclusive right to use the DRM technology in the IFE industry:

> With regard to the DRM technology, the aircraft industry will be an exclusive license for DIGECOR and all other markets will be non-exclusive. Further, the Parties agree that EDIGITAL will have a non-exclusive, unlimited right to use its DRM technology for non-aircraft industries.

Id., ¶ 2.

e.Digital is in breach of this exclusivity provision of this agreement because it has incorporated the DRM technology into its eVU, which e.Digital is offering in the IFE industry. Also, e.Digital is in breach of the license provision of this agreement because the DRM software e.Digital provided to digEcor contains a "time bomb" that causes the software to self-disable at certain intervals. This malicious code breaches the agreement by interfering with digEcor's enjoyment of its right to the "unrestricted, unlimited, and irrevocable" use of this software, and the failure to deliver the code without this restriction constitutes a breach of e.Digital's contractual duty to deliver a completely operational product.

e.Digital's breach of the exclusivity provision has caused digEcor substantial damages by allowing e.Digital to reap profits from its use of the DRM technology in the IFE industry in infringement of digEcor's exclusive license. digEcor has acknowledged the existence of an enforceable damages cap pertaining to breaches of the DRM Agreement, and will therefore only seek monetary damages on this claim up to the $25,000 amount of the cap. In addition to these monetary damages, digEcor seeks an order from this Court requiring e.Digital to honor its obligations under this agreement by (1) enjoining e.Digital from using the DRM technology in

devices offered for sale in the IFE industry, and (2) ordering e.Digital to provide the source code to the DRM technology so that digEcor can remove the time bomb and exercise its right to modify and add to the DRM technology at its discretion.

(3) digEcor's Claim for e.Digital's Breach of Warranty

In the 2002 Agreement, e.Digital warranted to digEcor that players it provided to digEcor would be free from material defects for a period of one year, and agreed to replace all defective products during the relevant time frame. The parties subsequently agreed that digEcor would do warranty repairs at its facility and charge-back the cost of these repairs to e.Digital. digEcor incurred approximately $80,000 for such warranty repairs. These warranty issues pertain to digEplayer 5500s that e.Digital delivered to digEcor prior to the expiration of the 2002 Agreement, and prior to the PO for the 1,250 units. This warranty claim does not pertain to any of the 1,250 units. The most prominent defects at issue involves the use of a headphone jack that failed systemically in a large batch of players. Another issue involve faulty Ethernet boards. digEcor seeks reimbursement for the costs to remedy these warranted defects, in the amount of $88,080.

(4) digEcor's Objections to Certain Affirmative Defenses.

digEcor objects to the assertion of two affirmative defenses that e.Digital now states it wishes to assert at trial that were not included or properly pled in e.Digital's pleadings. These are:

- e.Digital's assertion that it will raise "Commercial Impracticability" under Utah Code Ann. §§ 70A-2-615 as an affirmative defense.
- e.Digital's assertion that it will seek to allocate fault to Maycom, who was e.Digital's subcontract manufacturer pursuant to Utah Code Ann. § 78B-5-817 (formerly 78-27-37).

Each of these are affirmative defenses that were never pled by e.Digital. e.Digital does not cite to section 70A-2-615 in its Answer (dkt 92) nor does it raise "Commercial Impracticability" anywhere in its Answer. With regard to allocation of fault, e.Digital's answer states that it will seek allocation but fails to provide the information required by the Utah Code and local rule DuCIV R 9-1, which is a notice that explains the "factual and legal basis on which fault can be allocation" and identifies the third-party by name, city and state of residence, and employment of the person to whom fault will be allocated. Compliance with this rule is a mandatory prerequisite to seeking allocation. *Mason v. Brigham Young Univ.*, 2008 U,S. Dist. LEXIS 7842 (Case No. 2:06-CV-826 TS). e.Digital has failed to identify any factual or legal basis upon which fault can be allocated to e.Digital's subcontractor.

In addition, digEcor objects to e.Digital's affirmative assertion that the damages recoverable for breach of the Purchase Order should be limited by the "DRM Damages" limitation found in Paragraph 11 of the DRM Agreement. In its ruling of March 13, 2009, the Court rejected e.Digital's position on this defense. e.Digital has not filed any motion seeking reconsideration of this ruling.

C) **e.Digital's Claims and Defenses**

D) This section contains e.Digital's position as to its claims and defenses and supporting facts. digEcor disputes all of these defenses and many of the factual assertions set forth below.

(1) e.Digital Did Not Breach the Purchase Order

Although digEcor Purchase Order CJ5LY9RCW (the "PO") originally specified that the 1250 players should be shipped on January 10, 2006, e.Digital's performance was excused because digEcor made that deadline impossible for e.Digital to satisfy. The Court has already found: "digEcor does not dispute that its own actions in failing to timely provide specifications excused e.Digital from meeting the PO's listed ship date of January 10, 2006." (Order and Memorandum Decision, March 13, 2009, at 23 (dkt 324).) All digEplayer 5500s were to be manufactured with a specific color and logo on their outer cases to match the color and logo preferences of the airline to which the players were to be sold. The parties' regular practice was for digEcor/APS to provide this branding information at or within a few days of issuing a purchase order. However, well after the parties had already entered this PO, digEcor instructed e.Digital to wait to complete the players until it could deliver information on the case color and logos. e.Digital repeatedly objected to this practice, warning that it was not a smart way to deal with manufacturers, and that that it risked causing delays with the manufacturing process. Even after e.Digital made these warnings, and made numerous requests for the branding information, digEcor let the January 10, 2006 deadline pass without ever specifying the case color and logos and without paying in full for the players as required by the PO. digEcor, not e.Digital, breached the PO requiring January 10 delivery, and e.Digital notified digEcor of its material breach of the PO in a March 1, 2006 letter. Only after receiving this notice of its breach did digEcor specify the case branding information.

While it delayed the manufacture of the players, digEcor sought assurance from the manufacturer that it was still preparing to make the digEplayers and could do so when case information arrived. With e.Digital's approval, digEcor itself inspected the manufacturing facility in Korea in early January 2006, and found that the players were behind schedule, but refused to convey the details of its inspection to e.Digital. Despite these findings, digEcor continued to make payments, and did not take any action to remedy the situation. digEcor entered its contracts with customers, even accepting onerous penalties that they imposed for delayed delivery, well after it already knew of these manufacturing problems.

digEcor did not supply the necessary case information until March 2, 2006. Shortly thereafter, the manufacturer announced that it had misappropriated the payments to other projects and could no longer provide the digEplayers. e.Digital immediately informed digEcor of this development.

Despite this revelation, e.Digital worked hard with the manufacturer and another potential manufacturer to secure prompt delivery. Nevertheless, digEcor sued e.Digital on May 4, 2006 seeking money damages, but not specific performance of the PO. digEcor's lawsuit for

damages raised questions as to whether it would accept the players if delivered, questions which were compounded by digEcor's subsequent refusals throughout the summer of 2006. In June 2006, e.Digital offered to deliver the players by late July, but digEcor would not agree. e.Digital reiterated this possibility in its original Answer, filed June 14, 2006. (*See* Answer, ¶ 31, dkt. #7.) Later in June, e.Digital offered again to deliver the players, this time by mid-September, but digEcor refused to accept the delivery. digEcor's refusal to indicate its acceptance of the players was unreasonable and failed to give e.Digital adequate assurances. e.Digital was finally able to convince digEcor to accept the deliveries the week of October 30, 2006. At no time prior to this delivery date did the parties ever agree to a new delivery date. Under these circumstances, there was no time prior to the October-November 2006 delivery date that could have been reasonable for delivery.

digEcor's claim posits that a course of past conduct entitled it to make an order with a specific delivery date, completely disregard the delivery date, and then expect a foreign manufacturer to jump instantly into action a few weeks later, without any agreement to that effect. There is no evidence that any such course of conduct existed. e.Digital objected numerous times in writing to digEcor's pay-now, take-delivery-whenever-we-like approach, and explained that this approach disrupted the manufacturing process and risked the very problems that occurred in this case.

Maycom's performance problems, which digEcor partially caused and was aware of after the inspection, were beyond e.Digital's control, rendered subsequent delivery impracticable, and therefore cannot be held against e.Digital, especially where the parties mutually selected the manufacturer. The PO was entered in connection with the DRM project set forth in the DRM Agreement. Accordingly, digEcor's damages claims under the PO are barred. Moreover, all of digEcor's damages claims are based on faulty assumptions, improper calculations, improper models, and are unsubstantiated and unsupportable. digEcor's claimed damages are also caused by their own actions and/or the actions of others, including Maycom.

e.Digital Did Not Breach the DRM Agreement

e.Digital offers several defenses to this claim. First, digEcor cannot show that the eVU contains the disputed DRM technology. Further, digEcor has not paid the $25,000 required under the DRM Agreement as payment for the license of DRM technology, and e.Digital terminated the DRM agreement in writing before it was consummated, so e.Digital is not required to honor the license. digEcor's prior breaches of the agreement excused any further performance by e.Digital. Finally, "digEcor's sole and exclusive remedy for any and all claims concerning the DRM project based in contract, tort, or otherwise, in law or equity, including but not limited to, claims based upon EDIGITAL's breach of this Agreement or EDIGITAL'S termination of this agreement shall be limited to money damages, specifically, the lesser of the actual amount paid under this Agreement, or $25,000 USD." (DRM Agreement ¶ 11(c).) Accordingly, because e.Digital never accepted payment under the DRM Agreement (due to digEcor's breach), digEcor cannot recover any money damages. Moreover, digEcor cannot obtain an injunction for any alleged breach by e.Digital based on the plain language of paragraph 11(c). As with many software applications, e.Digital's download software application used on computers that work with the digEplayer 5500—not on the players themselves—included a security feature that the software license expires after a certain period of time. This feature

existed in the software well before the PO and the DRM Agreement were signed. digEcor has no claim to prevent e.Digital from using, marketing, or licensing in the IFE industry e.Digital's own digEplayer content download application, which is separate from RBE and therefore not subject to the DRM Agreement. Moreover, e.Digital provided a non-timeout version of this software used with the 1250 players in November 2006. Even if an injunction is available to digEcor, it cannot satisfy the necessary standards for an injunction, and it has never pleaded a claim for a mandatory injunction requiring e.Digital to provide anything to digEcor.

e.Digital Did Not Breach Any Warranty

e.Digital complied with all warranty repair requirements under the 2002 Agreement. digEcor is claiming damages for unsubstantiated and unauthorized repairs that digEcor allegedly did at its own facility. The 2002 agreement expressly provides "e.Digital shall replace all defective products during such period, provided that (a) APS shall have notified e.Digital within thirty (30) days of APS's discovery of any alleged defect during the warranty period; and (b) the Products have not been damaged, subjected to misuse or abnormal operation, altered or improperly repaired or maintained by APS. APS shall return to e.Digital transportation prepaid, all defective Products covered under a Warranty claim." (2002 Agreement ¶ H.) digEcor never satisfied these conditions for warranty repairs nor did the parties amend this provision, and therefore this claim is invalid. digEcor's damages claims are also unsubstantiated and therefore should be denied.

Defenses:

In addition to the defenses set forth above, e.Digital's defenses include: digEcor's claims and damages, if any, are barred in whole or in part by the doctrines of acquiescence, ratification, waiver, estoppel and/or unclean hands; digEcor's claims and damages, if any, are barred by the doctrines of privilege and justification; digEcor's claims and damages, if any, are barred or limited by paragraph 11 of the DRM, which, inter alia, disclaims warranties, excludes liability for "any lost profits, lost savings or any other incidental, special or consequential damages," and provides a "sole and exclusive remedy for any and all claims concerning the DRM project based in contract, tort or otherwise, in law of equity, including but not limited to claims based upon EDIGITAL's failure to perform under this Agreement, EDIGITAL's breach of this Agreement . . . shall be limited to money damages, specifically, the lesser of the actual amount paid under this Agreement or $25,000 USD;" e.Digital owed no duty, whether of disclosure or otherwise, to digEcor; digEcor's claims and damages, if any, are barred by their own independent investigations and assumption of the risk; digEcor's injuries, if any, were caused by its own fault or the fault of others, including Maycom, which bars or reduces any recovery of digEcor under Utah Code Ann. §§ 78B-5-817, et seq.; e.Digital is not responsible under paragraph 12 of the DRM for any delays in delivery of performance caused by failure of digEcor to fulfill its obligations in the DRM or for any failure to meet its own obligations under the DRM to the extent due to any cause beyond e.Digital's reasonable control; digEcor's claims are barred in whole or in part by its own breaches of the agreements between the parties; the eVU has not, and does not use "the DRM technology," and, therefore, is not subject to any exclusivity in paragraph 2 of the DRM to the extent such exclusivity is enforceable; digEcor's claims are barred because e.Digital's conduct at all times was reasonable, proper, and in good faith, and e.Digital did not directly or indirectly undertake any action in violation of law.

digEcor suggests that e.Digital's defenses of impracticability and allocation of fault were not properly pled. These arguments are groundless. e.Digital's answer clearly sets forth the factual basis for its impracticability defense. (*See, e.g.,* Amended Answer ¶¶ 25-31 (dkt. 63). Moreover, the parties argued, and the Court has already addressed the impracticability defense during summary judgment. There, the Court found that "[t]he question of whether delivery became commercially impracticable is one of fact." (Order and Memorandum Decision at 22 (dkt 324).) Indeed the Court cited the Tenth Circuit's *Leanin' Tree* decision, which rejects a similar attempt to prevent consideration of 'impracticability' as an affirmative defense. (*Id.*) Similarly, e.Digital's answer clearly identified allocation of fault and Maycom specifically. (*See, e.g.,* Amended Answer at ¶¶ 21, 29, 31, & Twelfth Affirmative Defense.) digEcor had communications with Maycom before and after the complaint was filed in this case and was at all times aware of Maycom's contact information.

Finally, digEcor suggests that e.Digital is attempting to have the Court reconsider its decision "that the PO, not the DRM Agreement, governs the purchase of the 1250 digEplayers 5500s at issue here." (Order and Memorandum Decision at 22 (dkt 324).) This is inaccurate, and digEcor apparently misunderstands the argument. e.Digital respects and understands the Court's decision. Nevertheless, as argued but not decided on summary judgment, the DRM Agreement has a provision that bars lost profits and consequential damages "arising out of or in connection with the DRM Project." The factual issue of whether digEcor's alleged damages arise out of or are in connection with the DRM Project is still very much at issue at trial.

6. **UNCONTROVERTED FACTS:**

A) digEcor is a Washington corporation with its principal place of business in Springville, Utah. digEcor was formerly known as Aircraft Protective Systems, Inc. ("APS").

B) e.Digital is a Delaware corporation with its principal place of business in San Diego, California.

C) On October 22, 2002, APS and e.Digital entered into a written agreement (the "2002 Agreement").

D) The digEplayer 5500 is a handheld video player that holds first-run Hollywood content, which airlines use as a means to distribute movies and other content to their passengers.

E) The digEplayer 5500 is known as an in-flight entertainment ("IFE") device. The industry that focuses on producing and marketing IFE devices is known as the IFE industry.

F) In October 2004, Wencor West, Inc. acquired APS by purchasing all of its stock.

G) After the acquisition, APS relocated its headquarters and facilities to Springville, Utah, and changed its name to "digEcor, Inc."

H) After the acquisition, digEcor continued to order digEplayer 5500s from e.Digital.

I) digEcor sells or leases these digEplayer 5500s with associated entertainment content to airlines.

J) e.Digital has sold over 9,000 digEplayer 5500s to APS/digEcor. Approximately 7,000 of these were sold to digEcor.

K) The 2002 Agreement had a three-year term, and expired on October 22, 2005.

L) In October or November, 2005, digEcor issued Purchase Order CJ5LY9RCW (the "PO") to e.Digital, which Fred Falk signed and accepted on behalf of e.Digital on November 11, 2005.

M) On or about November 15, 2005, digEcor paid to e.Digital the sum of $198,437.50 representing the "25% down with order" specified in the PO.

N) On or about December 9, 2005, digEcor paid e.Digital the sum of $198,437.50 representing the "25% due with order" specified in the PO.

O) On or about December 23, 2005, digEcor paid $100,000 as a prepayment of a portion of the remaining balance that was not yet due under the PO.

P) On or about January 10, 2006, digEcor paid e.Digital the sum of $233,625.00.

Q) digEcor withheld from this January 10 payment $50,000 for shells ($40.00 per unit * 1,250 units).

R) digEcor also withheld $13,250 for warranty issues claimed by digEcor.

S) e.Digital required payment of this $63,250 holdback, which digEcor paid on or about March 3, 2006.

T) digEcor accepted delivery of the 1,250 players from e.Digital when tendered and inspected starting the week of October 30 and into November 2006. digEcor rejected 26 of these players after inspection. However, e.Digital subsequently sent 24 players on December 8, 2006, and 2 players on December 19, 2006 to replace the rejected players. digEcor accepted these players.

U) Also on November 11, 2005, e.Digital and digEcor entered into a Digital Rights Management Engineering Program Services Agreement (the "DRM Agreement"), executed by Robert Putnam of e.Digital and Greg Beeston of digEcor.

V) The purchase price digEcor paid e.Digital for the 1,250 batteries under the PO was $80,000.

7. **CONTESTED ISSUES OF FACT AND LAW:**

A) What is the extent of digEcor's damages, if any, caused by e.Digital's failure to deliver the batteries under the PO?

B) Did digEcor breach its obligations under the PO?

C) Did e.Digital breach its obligations under the PO?

D) Did e.Digital breach its obligations under the PO by not having the sub-assemblies for the 1,250 players completed on or before January 10, 2006?

E) Was there an understanding between the parties that digEcor could withhold from its January 10 payment $50,000 for shells?

F) Did e.Digital pass on to Maycom the withholding of $13,250 eventually paid by digEcor for warranty issues claimed by digEcor?

G) Did the PO price of $793,750 included a per player fee to e.Digital to supervise the manufacturing of the player by Maycom?

H) The PO price also included a permanent license fee for use of the technology in the player?

I) Did e.Digital breach its obligations under the PO by failing to deliver the 1,250 players?

J) When could delivery of the 1,250 players reasonably be expected, if at all?

K) On what date, if any, was e.Digital required to deliver the 1,250 players to digEcor?

L) When did e.Digital first tender delivery of the 1,250 players to digEcor?

M) On or about March 15, 2006, did Mr. Falk of e.Digital forward to Brent Wood of digEcor an email from Mr. Bae of maycom in Korea informing Mr. Falk that Maycom was having financial difficulties that would affect deliver of the players.

N) What is the extent of digEcor's damages, if any, caused by e.Digital's delivery of the 1,250 players under the PO in October and November, 2006?

O) Are e.Digital's defenses to any claimed breach of the PO valid thereby eliminating or excusing alleged breaches and/or eliminating or reducing any applicable damages?

P) Was e.Digital ever obligated to deliver to digEcor more than 1250 players under the PO?

Q) What is the extent of digEcor's damages, if any, caused by e.Digital's alleged non-delivery of additional digEplayers beyond the 1250 under the PO?

R) Are e.Digital's defenses to any claimed breach concerning delivery of additional digEplayers beyond 1250 valid thereby eliminating or excusing alleged breaches and/or eliminating or reducing any applicable damages?

S) Has digEcor performed all of its obligations under the DRM Agreement?

T) Has the DRM Agreement terminated?

U) Has e.Digital breached the exclusive license provision of the DRM Agreement by employing the "DRM technology," as specified in Addendum One to the DRM Agreement, in e.Digital's eVU sold or leased in the IFE Industry?

V) What money damage can digEcor recover, if any, up to or including the maximum $25,000 damages under the DRM Agreement for e.Digital's alleged breach of the DRM Agreement?

W) Does digEcor have a valid claim for any form of injunction against e.Digital under the DRM Agreement?

X) Will digEcor suffer irreparable harm unless the Court enjoins e.Digital from using the "DRM technology," as specified in Addendum One to the DRM Agreement, in the IFE industry?

Y) Does the threatened injury to digEcor outweigh any injury if this injunction issues?

Z) Is it adverse to the public interest to enjoin e.Digital from using the "DRM technology," as specified in Addendum One to the DRM Agreement, in the IFE industry?

AA) Has e.Digital breached the DRM Agreement by including a time-bomb feature in the software that is timed to automatically self-disable the device?

BB) Has e.Digital breached the DRM Agreement by failing to deliver the source code for the DRM software to digEcor?

CC) Is digEcor entitled to an Order from the Court requiring e.Digital to deliver the source code for the DRM software to digEcor so that digEcor can remove the time bomb?

DD) Is digEcor entitled to use the software received with the 1,250 players to remove the time-bomb on all if its players?

EE) Is digEcor entitled to have source code software need to remove the DIVX from its legacy players?

FF) Is digEcor entitled to an Order from the Court requiring e.Digital to deliver the source code for the DRM software to digEcor so that digEcor can exercise its right to modify and add to the DRM technology at digEcor's discretion?

GG) Are e.Digital's defenses to any claimed breach concerning the DRM Agreement valid thereby eliminating or excusing alleged breaches and/or eliminating or reducing any applicable damages or other remedy?

HH) Did e.Digital breach warranty obligations to digEcor under the warranty provision of the 2002 Agreement?

II) Did e.Digital turn over all warranty repairs to digEcor?

JJ) Did digEcor comply with its obligations under the warranty provision of the 2002 Agreement?

KK) What is the extent of digEcor's damages, if any, caused by e.Digital's alleged breach of the warranty of the 2002 Agreement?

LL) Are e.Digital's defenses to any claimed breach concerning warranty obligations valid thereby eliminating or excusing alleged breaches and/or eliminating or reducing any applicable damages or other remedy?

8. **EXHIBITS:**

9. The parties have stipulated to the authenticity and admissibility of all of the documents identified on **Exhibit A**, attached hereto. These documents represent the Exhibits of the parties, and are admitted and may be considered by the Court at the trial of this matter. In so doing, each party reserves its right to advocate to the Court regarding the weight, relevancy, materiality or reliability that should be accorded to any of these Exhibits, or any statement contained therein, and for that purpose the parties may cite to and advocate the policies as embodied in the Federal Rules of Evidence, including Rules 408 or 801, or elsewhere. The Court will consider such arguments of

counsel and accord such weight to each particular exhibit as the Court deems appropriate in its role as trier of fact.

A) Exhibits received in evidence and placed in the custody of the clerk may be withdrawn from the clerk's office upon signing of receipts therefor by either party. The exhibits shall be returned to the clerk's office within a reasonable time and in the meantime shall be available for inspection at the request of other parties.

B) Exhibits identified and offered that remain in the custody of the party offering them shall be made available for review by the offering party to any other party to the action that requests access to them in writing.

C) If other exhibits are to be offered, the necessity for which reasonably cannot now be anticipated, they will be submitted to opposing counsel prior to their use at trial.

10. **WITNESSES (PLAINTIFFS):**

A) In the absence of reasonable notice to opposing counsel to the contrary, digEcor will call as witnesses:

B) Josh Lemon

C) Wally Harkness

D) Brent Wood

E) Fred Falk

F) Chris Wood

G) Derk Rasmussen

H) Paul Hepworth (called on Monday, May 11)

I) In the absence of reasonable notice to opposing counsel to the contrary, digEcor may call as witnesses:

J) William Boyer

K) William Blakeley

L) Steve Hurst

M) Eric Vernon

N) Plaintiff will use the following deposition transcripts:

O) Web Barth: 9:2-4; 82:8-84:2; 101:23-108:2; 153:11-155:24

P) Robert Putnam: 12:1-14:18; 46:21-58:2

Q) Atul Anandpura: 20:23-32:18; 196:11-204:1

R) Kevin Bostonero: 10:1-15:16; 101:23-108:2; 153:11-155:24

S) e.Digital's 30(b)(6): 5:10-7:24; 10:22-11:20; 86:13-164:16

11. **WITNESSES (DEFENDANT):**

A) In the absence of reasonable notice to opposing counsel to the contrary, Defendant will call as witnesses:

B) Fred Falk

C) William Blakeley

D) Anthony Wechselberger

E) Scott Hampton

F) In the absence of reasonable notice to opposing counsel to the contrary, Plaintiff may call as witnesses:

G) Robert Putnam

H) Brent Wood

I) Chris Wood

J) Defendant will or may use the following deposition transcripts:

K) digEcor 30(b)(6): 30(b)(6) Deposition of Brent Wood: 57:5-58:14; 63:19-65:9; 73:14-74:11; 85:9-13; 90:15-91:1; 92:18-24; 98:14-16; 104:13-105:15; 114:13-116:7; 126:11-23; 133:22-134:11; 179:6-20; 187:16-200:19; 205:2-209:8; 212:22-214:4.

Atul Anandpura: 27:4-28:22; 32:5-18; 204:2-205:25.

L) Kevin Bostenero: 71:1-74:25.

M) Steve Hurst: 26:3-29:13; 65:17-67:15; 175:15-178:1.

N) Web Barth: 103:25-104:18.

12. **PROTECTION OF CONFIDENTIAL INFORMATION:** Certain of the Exhibits and certain anticipated testimony contains information that is confidential to a party and should not be placed in the public record or revealed to the opposing party. The parties will cooperate in designating such evidence and the Court will enforce reasonable measures to maintain the confidentiality of such information.

13. **REQUESTS FOR INSTRUCTIONS:** This case is to be tried to the Court.

14. **AMENDMENTS TO PLEADINGS:** There were no requests to amend pleadings, except as the Court deems necessary.

15. **TRIAL SETTING:** The case is set for a trial without a jury on Wednesday, May 6, 2009 at 10:30 a.m. in the Courtroom of Judge Clark Waddoups, 350 South Main Street, Salt Lake City, Utah.

16. **POSSIBILITY OF SETTLEMENT:** Unlikely.

DATED May 5, 2009

BY THE COURT

UNITED STATES DISTRICT COURT

The foregoing proposed pretrial order (prior to execution by the court) is hereby adopted this 5th day of May, 2009.

/s/ David W. Tufts

David W. Tufts
Erin T. Middleton
Attorneys for digEcor, Inc.
(*Signed and filed with authorization of David Tufts*)

/s/ Ryan B. Bell

Samuel C. Straight
Ryan B. Bell
Attorneys for e.Digital Corporation

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FILED
U.S. DISTRICT COURT

2009 MAY -6 A 10:42

DISTRICT OF UTAH

BY: _____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

LAURA CONROY, Plaintiff, vs. THOMAS J. VILSACK, [Secretary of Agriculture, United States Department of Agriculture] Defendant.	: : : : :	Case No. 2:06CV 00867 ~~DB~~ CW **ORDER GRANTING DEFENDANT'S MOTION TO EXTEND THE DEADLINE TO FILE AND PAGE LIMITATIONS OF HIS REPLY IN SUPPORT OF MOTION TO EXCLUDE THE TESTIMONY OF NANCY DODD AND PAUL KATZ** Honorable Clark Waddoups

The Court having considered Defendant's Motion to Extend the Deadline to File and the Page Limitations of His Reply in Support of his Motion to Exclude the Testimony of Nancy Dodd and Paul Katz, plaintiff's lack of opposition to this motion, and good cause appearing therefor,

IT IS HEREBY ORDERED that Defendant's Motion to Extend the Deadline to File and Page Limitations of His Reply in Support of his Motion to Exclude the Testimony of Nancy Dodd and Paul Katz granted.

Defendant shall file his Reply in Support of his Motion to Exclude the Testimony of Nancy Dodd and Paul Katz by Thursday, May 14th, 2009.

Defendant's brief shall not exceed twenty pages, exclusive of face sheet, table of contents, introduction, statement of issues and facts, and exhibits.

ENTERED this 5th day of May, 2009.

BY THE COURT:

CLARK WADDOUPS
United States District Judge

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Attorneys for Defendant Cal-Agrex, Inc.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

LEHI ROLLER MILLS CO., INC., a Utah corporation, Plaintiff, v. CAL-AGREX, INC., a California corporation, and DOE DEFENDANTS 1-10, Defendants.	Case No. 2:08 CV 291 DK Consolidated Case No. 2:06 CV 1001 DK **ORDER GRANTING STIPULATED MOTION FOR EXTENSION OF TIME**
CAL-AGREX, INC., a California corporation, Counterplaintiff, v. LEHI ROLLER MILLS CO., INC., a Utah corporation, JERRY GOODWIN, an individual, and DOE DEFENDANTS 1-10, Counterdefendants.	Judge Dale A. Kimball

Pursuant to the stipulated motion for extension of time and good cause appearing,

IT IS HEREBY ORDERED that Defendant Cal-Agrex, Inc. may have an extension of time to and including Friday, May 22, 2009, in which to file a reply in support of its Motion for Clarification, Motion for Leave to Amend Counterclaim and Third Party Claim, and Motion to Sever Cases. The parties further stipulate that Lehi's and Goodwin's opposition was due May 1, 2009.

DATED this 6th day of May, 2009.

BY THE COURT:

Dale A. Kimball
United States District Court Judge

103398v1

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

JAMAL S. YANAKI, **Plaintiff and Counterclaim Defendant,** **vs.** **CHARLES J. DANIEL, M.D.** **Defendant and Counterclaim Plaintiff.**	**MEMORANDUM DECISION AND ORDER** **Case No. 2:07CV648 DAK**

This matter is before the court on (1) Defendant/ Crossclaim-Plaintiff Dr. Daniel's ("Dr. Daniel") Motion in Limine; (2) Plaintiff/Crossclaim-Defendant Mr. Yanaki's ("Mr. Yanaki") Motion in Limine; (3) the issue concerning the possibility that Dr. Daniel may call Mr. Yanaki's counsel as a witness at trial, which the court has construed as Dr. Daniel's Motion to Disqualify Plaintiff's Attorney, and (4) the Objections to Mr. Taggart's designated deposition testimony. A hearing on the motions (but not on the objections to the deposition testimony) was held on May 5, 2009. At the hearing, Dr. Daniel was represented by Matthew N. Evans and Matthew M. Cannon. Mr. Yanaki was represented by David W. Scofield. Before the hearing, the court carefully considered the memoranda and other materials submitted by the parties. Since taking the motions under advisement, the court has further considered the law and facts relating to these motions. Now being fully advised, the court renders the following Memorandum Decision and Order.

I. DR. DANIEL'S MOTION IN LIMINE

A. Evidence Concerning Attorneys' Fees and Costs

Dr. Daniel seeks a ruling that if he prevails on his claim under the Utah Uniform Securities Act, which provides for costs and attorneys' fees, those issues shall be addressed through post-verdict briefing by the court–not by the jury during trial. Mr. Yanaki, however, argues the Tenth Circuit's recent opinion in *Simplot v. Chevron Pipeline,* ___ F.3d ___, 2009 WL 1089558 (10th Cir. April 23, 2009) mandates that he is entitled to have the jury determine the issue of costs and attorneys' fees in this case.

In *Simplot,* the fees were sought as consequential damages caused by a breach of a contractual duty to defend. In this case, Dr. Daniel's entitlement to attorney fees and costs arises from statute; unlike the situation in *Simplot*, which involved a "'free-standing' breach of contract claim . . . for attorneys' fees already incurred in a separate, underlying action against a third party." *Id.* *12. Thus, the court finds that if Dr. Daniel prevails on his claim under the Utah Uniform Securities Act, the issue of costs and attorneys' fees shall be addressed by the court after post-verdict briefing by the parties.

B. Testimony of Dr. Richard Anderson

Dr. Daniel seeks a ruling that if Dr. Anderson does not testify at trial, then Mr. Yanaki cannot testify at trial about what Dr. Anderson allegedly told him about the Department of Defense grant because the statement to Mr. Yanaki would constitute inadmissible hearsay and should be excluded. The court agrees that such testimony constitutes inadmissible hearsay.

If appears, however, that Dr. Anderson will testify at trial, and thus this issue is likely moot. As long as Dr. Anderson testifies at trial, Mr. Yanaki may testify as to what Dr. Anderson

allegedly told him.

II. MR. YANAKI'S MOTION IN LIMINE

A. Testimony Regarding the Lawsuit Filed By Plaintiff's Pre-Bacterin Employer

Mr. Yanaki argues that his relationship with his employer ***prior*** to Bacterin is unconnected to Dr. Daniel's claims surrounding the purchase of Bacterin stock, and thus his prior lawsuit is irrelevant here. He contends that the mere fact of being accused of stealing trade secrets is completely lacking in any probative value.

Dr. Daniel, however, argues that Mr. Yanaki had a duty to disclose information material to the sale of the Bacterin stock and that, when purchasing stocks from a private individual under the circumstances this case presents, a potential buyer would undoubtedly want to know if the seller had recently been sued by an employer for allegedly stealing trade secrets. Dr. Daniel also argues that under Rule 405(b), "[i]n cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct." Dr. Daniel contends that Mr. Yanaki's truthfulness and willingness to allegedly abuse company information is a character trait that is essential to Daniel's claims of fraud.

The court finds that testimony concerning the lawsuit involving Mr. Yanaki and his previous employer is irrelevant to the claims at issue here. Because the lawsuit was settled, there was no determination that Mr. Yanaki actually committed the acts asserted in the lawsuit. Mere allegations do not constitute evidence. The court also finds that even if there were any probative value to this testimony, it would be substantially outweighed by the danger of unfair

prejudice and confusion of the issues. Thus, any testimony regarding this lawsuit is excluded.

B. Testimony Regarding Mr. Yanaki's Individual Sales Transactions of Bacterin Stock to Persons Other Than Defendant.

Mr. Yanaki argues that whether he had sold to friends, family and acquaintances at prices less than he sold to Dr. Daniel, and at times where he was under different financial circumstances, is irrelevant to whether Dr. Daniel was getting a good deal or even the best deal that Mr. Yanaki was willing to give Dr. Daniel at the time of the sale.

Dr. Daniel disagrees, arguing that Mr. Yanaki failed to disclose that within a year prior to his offer to Daniel, he had sold many of his Bacterin shares to other individuals for over 70% less than the price at which he was offering them to Dr. Daniel and that the price was consistent with the shares that Bacterin and/or Dr. Cook was offering to others. Dr. Daniel contends that had he been told of these sales, he would not have considered purchasing Bacterin stock from Mr. Yanaki at $2.30 a share. In addition, Dr. Daniel argues that these material omissions are even more relevant because Mr. Yanaki had represented that he had intimate knowledge of the business dealings of Bacterin to induce Dr. Daniel to sign the Bill of Sale. According to Dr. Daniel, the fact that Mr. Yanaki had sold the stock for far less than he was willing to sell to Dr. Daniel also demonstrates that Mr. Yanaki was more likely to make misrepresentations to Dr. Daniel to try to get an inflated price for his shares.

The court finds that evidence concerning Mr. Yanaki's individual sales transactions of Bacterin stock to individuals other than Dr. Daniel is relevant and admissible at trial. Mr. Yanaki may explain the transactions and the reasons for selling his stock to others at a lower price, but Dr. Daniel is entitled to explore these sales transactions to other individuals.

C. Evidence from Guy Cook Concerning the Response of Plaintiff to Defendant's Question

Mr. Yanaki contends that the statements made by him on July 3, 2007 came after the July 2, 2007 telephone conversation in which the purchase and sale agreement was reached and thus it could not have induced Dr. Daniel to enter into the contract. The court, however, has already ruled that whether a contract was reached at that point is a question for the jury, and thus this argument has no merit. Mr. Yanaki also argues that Mr. Cook is in no position to know whether Mr. Yanaki's representations to Dr. Daniel were in fact false.

Dr. Daniel claims that Dr. Cook was clearly in a position to know whether Mr. Yanaki's representations were false.

The court agrees with Dr. Daniel that Dr. Cook's testimony concerning the accuracy of the representations made by Mr. Yanaki in his email on July 3, 2007 is relevant and admissible.

III. DR. DANIEL'S MOTION TO DISQUALIFY MR. SCOFIELD AS MR. YANAKI'S COUNSEL

According to Dr. Daniel, in the spring of 2007, just a few months before meeting Dr. Daniel, Mr. Yanaki entered into at least two transactions with his attorney, Dave Scofield, his law firm for the sale of Bacterin stock. Mr. Yanaki sold these shares for 60 cents per share – consistent with the going rate for shares that had been established by Bacterin in a letter to the shareholders in January 2007. Dr. Daniel also argues that Mr. Yanaki also sold shares of Bacterin stock to Mr. Scofield in exchange for a car.

Mr. Yanaki and Mr. Scofield disagree, claiming that Mr. Scofield's testimony is unnecessary because Mr. Yanaki may testify as to the transaction.

Rule 3.7 of the Utah Rules of Professional Conduct states that, absent substantial

hardship on the client, "a lawyer shall not act as an advocate at trial for a party in which the lawyer is likely to be a necessary witness." In determining whether substantial hardship exists, a court is required to balance the interests of those of the tribunal and opposing party. *See DJ Inv. Group LLC v. Westbrook LLC*, 147 P.3d 414, 419 (Utah 2006). Factors to consider in making this determination include whether the tribunal is likely to be misled, whether the opposing party is likely to suffer prejudice, the importance of the testimony, and the effect of disqualification on the lawyer's client. *Id.* Even where there is a risk of prejudice to the opposing party, "due regard must be given to the effect of disqualification on the lawyer's client." *Rule 3.7 of the Utah Rules of Professional Conduct, Comment 4.* "It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness." *Id; see Zions First Nat'l Bank v. Barbara Jensen Interiors, Inc.,* 781 P.2d 478, 480-81 (Utah Ct. App.1989) ("A motion to disqualify counsel must be immediately filed and diligently pursued as soon as the party becomes aware of the basis for disqualification, and it may not be used as a manipulative litigation tactic.").

The court declines to disqualify Mr. Scofied for two reasons: the untimely filing of the instant motion to disqualify and because disqualification would impose a substantial hardship on Mr. Yanaki. Mr. Yanaki would be forced to hire new counsel at a substantial cost and the trial of this matter would be substantially delayed. But the court also declines to strike Mr. Scofield as a "may call" witness. Ideally, the testimony of Mr. Scofield will not be necessary, but if Dr. Daniel finds during the trial that Mr. Scofield's testimony becomes necessary, the court will revisit the issue at that time. The court, however, will not exclude Mr. Scofield from the courtroom during Mr. Yanaki's testimony.

IV. OBJECTIONS TO MR. YANAKI'S DESIGNATED DEPOSITION TESTIMONY OF TAGGART

The court has reviewed Dr. Daniel's objections to the Taggart deposition testimony. At this point, the court is inclined to overrule the objections and permit the testimony.[1] But during the trial, when there is more context to the testimony and the objections, Dr. Daniel may renew his objections, and the court may rule otherwise.

CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that Dr. Daniel's Motion in Limine [Docket # 76] is GRANTED, and Mr. Yanaki's Motion in Limine [Docket # 78] is GRANTED in part and DENIED in part, consistent with the discussion above. Dr. Daniel's Motion to Disqualify Mr. Scofield (which has not been filed as a motion but was briefed in documents ## 94 & 96) is DENIED, but Mr. Scofield may remain designated as a "may call" witness. As to Dr. Daniel's objections to Mr. Taggart's deposition testimony, the court preliminarily OVERRULES the objections, but Dr. Daniel may renew his objections during trial.

DATED this 6th day of May, 2009.

BY THE COURT:

DALE A. KIMBALL
United States District Judge

[1] Page 19 of the Taggart deposition has been omitted from Mr. Yanaki's submission of the designated deposition pages (see Exhibit A of Docket # 92) and thus the court has not been able to review that page. The court requests that Mr. Yanaki file this missing page.

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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA,	:	ORDER CONTINUING SENTENCING
Plaintiff,	:	
v.	:	
CHAD JAY BUTLER,	:	Case No. 2:08 CR 237
Defendant.	:	Judge: Honorable Dale A. Kimball

Based upon motion of defendant, stipulation of the parties, and good cause appearing therefore, it is HEREBY ORDERED that the sentencing hearing currently scheduled for May 6, 2009 at 2:00 p.m. is continued to the 12th day of May, 2009 at 3:30 p.m.

Dated this 6th day of May, 2009.

Dale A. Kimball

The Honorable Dale A. Kimball
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

TRAVIS CHIDESTER, Plaintiff, vs. MICHAEL J. ASTRUE, Commissioner of the Social Security Administration Defendant.	SCHEDULING ORDER Civil No. 2:08-cv-0572 Judge Brooke C. Wells

The court establishes the following scheduling order in the above captioned case:

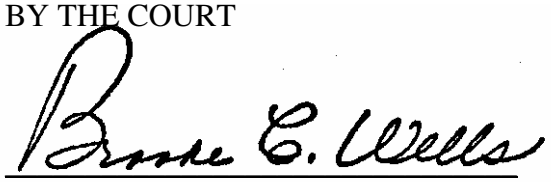
1. Plaintiff's motion for review of the Commissioner's decision and accompanying memorandum should be filed by July 17, 2009.

2. Defendant's memorandum in opposition should be filed by August 17, 2009.

3. Plaintiff may file a reply memorandum by September 2, 2009.

DATED this 6th day of May, 2009.

BY THE COURT



Honorable Brooke C. Wells

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

JAMES DAVID NAFUS Plaintiff, v. INTOWN SUITES, Defendant.	ORDER TO SHOW CAUSE Civil No. 2:08 cv 847 DB Judge Dee Benson Magistrate Judge Brooke C. Wells

Plaintiff's complaint was filed on November 3, 2008.[1] Approximately ten days later on November 13, 2008, the court sent Plaintiff a letter informing him that he "may serve the summons and complaint upon the defendants."[2] Service has not been effected upon the Defendant. Unless Plaintiff is able to show good cause within 15 days from the date of this order why service was not made within 120 days following the filing of the complaint, the court will, on its own motion, dismiss this action without prejudice pursuant to rule 4(m).[3]

DATED this 6th day of May, 2009.

Brooke C. Wells
United States Magistrate Judge

[1] Docket no. 3.
[2] Letter dated November 13, 2008, docket no. 7.
[3] *See* Fed.R.Civ.P. 4(m).

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

Central Division for the District of Utah

QUESTAR EXPLORATION AND PRODUCTION CO.,	**SCHEDULING ORDER**
Plaintiff,	**Case No.** 2:08-CR-00859
vs.	**District Judge Tena Campbell**
CHRISTOPHER M. SULLIVAN,	
Defendant.	

Pursuant to Fed. R. Civ. P. 16(b), the Magistrate Judge held an Initial Pretrial Conference (docket #20) on May 1, 2009. The following matters are scheduled. The times and deadlines set forth herein may not be modified without the approval of the Court and on a showing of good cause.

ALL TIMES 4:30 PM UNLESS INDICATED

1.	**PRELIMINARY MATTERS**	**DATE**
	Nature of claim(s) and any affirmative defenses:	
a.	**Was Rule 26(f)(1) Conference held?**	*02/10/09*
b.	**Has Attorney Planning Meeting Form been submitted?**	*No*
c.	**Was 26(a)(1) initial disclosure completed?**	*02/27/09*

2.	**DISCOVERY LIMITATIONS**	**NUMBER**
a.	**Maximum Number of Depositions by Plaintiff(s)**	*10*
b.	**Maximum Number of Depositions by Defendant(s)**	*10*
c.	**Maximum Number of Hours for Each Deposition** **(unless extended by agreement of parties)**	*8*
d.	**Maximum Interrogatories by any Party to any Party**	*25*
e.	**Maximum requests for admissions by any Party to any Party**	*30*
f.	**Maximum requests for production by any Party to any Party**	*25*

DATE

3. AMENDMENT OF PLEADINGS/ADDING PARTIES[1]

a.	**Last Day to File Motion to Amend Pleadings**	*04/22/09*
b.	**Last Day to File Motion to Add Parties**	*04/22/09*

4. RULE 26(a)(2) REPORTS FROM EXPERTS[2]

a.	**Plaintiff**	*07/22/09*
b.	**Defendant**	*08/21/09*
c.	**Counter Reports**	*09/16/09*

5. OTHER DEADLINES

a.	**Discovery to be completed by:**	
	Fact discovery	*09/23/09*
	Expert discovery	*10/16/09*
b.	***(optional)* Final date for supplementation of disclosures and discovery under Rule 26 (e)**	*09/23/09*
c.	**Deadline for filing dispositive or potentially dispositive motions**	*11/12/09*

6. SETTLEMENT/ ALTERNATIVE DISPUTE RESOLUTION

a.	**Referral to Court-Annexed Mediation**	*no*
b.	**Referral to Court-Annexed Arbitration**	*no*
c.	**Evaluate case for Settlement/ADR on**	*10/16/09*
d.	**Settlement probability:**	

7. TRIAL AND PREPARATION FOR TRIAL:

a.	**Rule 26(a)(3) Pretrial Disclosures[3]**	
	Plaintiffs	**02/26/10**
	Defendants	**03/12/10**
b.	**Objections to Rule 26(a)(3) Disclosures (if different than 14 days provided in Rule)**	

				DATE
c.	**Special Attorney Conference[5] on or before**			**03/26/10**
d.	**Settlement Conference[6] on or before**			**03/26/10**
e.	**Final Pretrial Conference**		**3:00**	**04/13/10**
f.	**Trial**	**Length**	**Time**	**Date**
	i. Bench Trial			
	ii. Jury Trial	***Four days***	***8:30 a.m.***	***05/04/10***

8. OTHER MATTERS:

Counsel should contact chambers staff of the District Judge regarding Daubert and Markman motions to determine the desired process for filing and hearing of such motions. All such motions, including Motions in Limine should be filed well in advance of the Final Pre Trial. Unless otherwise directed by the court, any challenge to the qualifications of an expert or the reliability of expert testimony under Daubert must be raised by written motion before the final pre-trial conference.

Dated this 5 day of May, 2009.

BY THE COURT:

David Nuffer
U.S. Magistrate Judge

2. Counsel must still comply with the requirements of Fed. R. Civ. P. 15(a).

3. A party shall disclose the identity of each testifying expert and the subject of each such expert's testimony at least 60 days before the deadline for expert reports from that party. This disclosure shall be made even if the testifying expert is an employee from whom a report is not required.

4. Any demonstrative exhibits or animations must be disclosed and exchanged with the 26(a)(3) disclosures.

5. The Special Attorneys Conference does not involve the Court. Counsel will agree on voir dire questions, jury instructions, a pre-trial order and discuss the presentation of the case. Witnesses will be scheduled to avoid gaps and disruptions. Exhibits will be marked in a way that does not result in duplication of documents. Any special equipment or courtroom arrangement requirements will be included in the pre-trial order.

6. Counsel must ensure that a person or representative with full settlement authority or otherwise authorized to make decisions regarding settlement is available in person or by telephone during the Settlement Conference.

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Attorneys for Defendant
Cover-Pools Incorporated

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

POOL COVER SPECIALISTS NATIONAL, INC., a Utah corporation, Plaintiff, vs. COVER-POOLS INCORPORATED., a Utah corporation, JOHN DOES 1-10, Defendants.	**ORDER FOR *PRO HAC VICE* ADMISSION OF GREGORY S. TAMKIN** Case No. 2:08CV879DAK Judge: Dale A. Kimball

It appearing to the Court that Petitioner meets the *pro hac vice* admission requirements of D.U. Civ Rule 83-1.1(d), the motion for the admission *pro hac vice* of GREGORY S. TAMKIN in the United States District Court, District of Utah in the subject case is GRANTED.

Dated this 6th day of May, 2009.

Dale A. Kimball

The Honorable Dale A. Kimball

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Attorneys for Defendant
Cover-Pools Incorporated

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

POOL COVER SPECIALISTS NATIONAL, INC., a Utah corporation, Plaintiff, vs. COVER-POOLS INCORPORATED., a Utah corporation, JOHN DOES 1-10, Defendants.	**ORDER FOR *PRO HAC VICE* ADMISSION OF JOSHUA FINKELSTEIN** Case No. 2:08CV879DAK Judge: Dale A. Kimball

It appearing to the Court that Petitioner meets the *pro hac vice* admission requirements of D.U. Civ Rule 83-1.1(d), the motion for the admission *pro hac vice* of JOSHUA FINKELSTEIN in the United States District Court, District of Utah in the subject case is GRANTED.

Dated this 6th day of May, 2009.

Dale A. Kimball

The Honorable Dale A. Kimball

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

AARON L. SAMPSON, *Plaintiff*, v. INTEGRA TELECOM HOLDINGS, INC., dba INTEGRA TELECOM, and INTEGRA TELECOM OF UTAH, INC., *Defendants*.	**SCHEDULING ORDER AND ORDER VACATING HEARING** Case No. 2:09-cv-120 Judge Clark Waddoups

Pursuant to Fed.R. Civ P. 16(b), the Magistrate Judge[1] received the Attorneys' Planning Report filed by counsel (docket #10). The following matters are scheduled. The times and deadlines set forth herein may not be modified without the approval of the Court and on a showing of good cause.

IT IS ORDERED that the Initial Pretrial Hearing set for June 10, 2009, at 11:30 a.m. before Magistrate Judge David Nuffer is VACATED.

****ALL TIMES 4:30 PM UNLESS INDICATED****

1.	**PRELIMINARY MATTERS**	**DATE**
	Nature of claims and any affirmative defenses:	
a.	Was Rule 26(f)(1) Conference held?	*05/1/09*
b.	Has Attorney Planning Meeting Form been submitted?	*05/1/09*
c.	Was 26(a)(1) initial disclosure completed?	*05/29/09*

2.	**DISCOVERY LIMITATIONS**	**NUMBER**
a.	Maximum Number of Depositions (non-expert) Per Side	*7*
b.	Maximum Number of Hours for Each Deposition (unless extended by agreement of parties)	*8*

c.	Maximum Interrogatories by any Party to any Party		*45*
d.	Maximum requests for admissions by any Party to any Party		*45*
e.	Maximum requests for production by any Party to any Party		*33*

3.	**AMENDMENT OF PLEADINGS/ADDING PARTIES**	**DATE**
a.	Last Day to File Motion to Amend Pleadings	*06/30/09*
b.	Last Day to File Motion to Add Parties	*06/30/09*

2

4.	**RULE 26(a)(2) REPORTS FROM EXPERTS**	**DATE**
a.	Plaintiff	*11/20/09*
b.	Defendants	*12/20/09*
c.	Counter reports	*none*

5.	**OTHER DEADLINES**	**DATE**
a.	Discovery to be completed by:	
	Fact discovery	*10/30/09*
	Expert discovery	*1/31/10*
b.	*(optional)* Final date for supplementation of disclosures and discovery under Rule 26 (e)	*per Rules*
c.	Deadline for filing dispositive or potentially dispositive motions	*01/31/10*

6.	**SETTLEMENT/ALTERNATIVE DISPUTE RESOLUTION**	**DATE**
a.	Referral to Court-Annexed Mediation: *No*	
b.	Referral to Court-Annexed Arbitration *No*	

c.	Evaluate case for Settlement/ADR on			*10/30/09*
d.	Settlement probability:	fair		

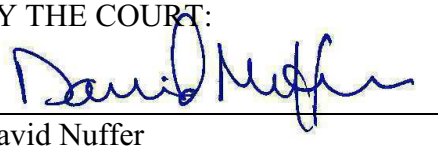
7.	**TRIAL AND PREPARATION FOR TRIAL**		**TIME**	**DATE**
a.	Rule 26(a)(3) Pretrial Disclosures			
	Plaintiff			*05/07/10*
	Defendants			*05/21/10*
b.	Objections to Rule 26(a)(3) Disclosures (if different than 14 days provided in Rule)			*00/00/00*
c.	Special Attorney Conference on or before			*06/04/10*
d.	Settlement Conference on or before			*06/04/10*
e.	Final Pretrial Conference		2:30 p.m.	*06/21/10*
f.	Trial	Length		
	i. Bench Trial	*# days*	___:__ _.m.	*00/00/00*
	ii. Jury Trial	*Four days*	8:30 a.m.	*07/06/10*

8. OTHER MATTERS

Counsel should contact chambers staff of the District Judge regarding Daubert and Markman motions to determine the desired process for filing and hearing of such motions. All such motions, including Motions in Limine should be filed well in advance of the Final Pre Trial. Unless otherwise directed by the court, any challenge to the qualifications of an expert or the reliability of expert testimony under Daubert must be raised by written motion before the final pre-trial conference.

Dated this __5th_____ day of _____May____, 2009.

BY THE COURT:



David Nuffer
U.S. Magistrate Judge

[1] The Magistrate Judge completed Initial Pretrial Scheduling under DUCivR 16-1(b) and DUCivR 72-2(a)(5). The name of the Magistrate Judge who completed this order should NOT appear on the caption of future pleadings, unless the case is separately referred to that Magistrate Judge. A separate order may refer this case to a Magistrate Judge under DUCivR 72-2 (b) and 28 USC 636 (b)(1)(A) or DUCivR 72-2 (c) and 28 USC 636 (b)(1)(B). The name of any Magistrate Judge to whom the matter is referred under DUCivR 72-2 (b) or (c) should appear on the caption as required under DUCivR10-1(a).

[2] Counsel must still comply with the requirements of Fed. R. Civ. P. 15(a).

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Attorneys for the United States of America

IN THE UNITED STATES DISTRICT COURT, DISTRICT OF UTAH,
CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, a Delaware corporation,

Defendant

SCHEDULING ORDER

Case No. 2:09-cv-146

Judge Ted Stewart

Pursuant to Fed. R. Civ P. 16(b), the Magistrate Judge received the Attorneys' Planning Report (docket #8) filed by counsel and conducted an initial pretrial conference on 5/1/2009 (docket #10). The following matters are scheduled. The times and deadlines set forth herein may not be modified without the approval of the Court and on a showing of good cause.

ALL TIMES 4:30 PM UNLESS INDICATED

1.	**PRELIMINARY MATTERS**	**DATE**
	Nature of claim(s) and any affirmative defenses:	
a.	Was Rule 26(f)(1) Conference held?	*3/31/2009*
b.	Has Attorney Planning Meeting Form been submitted?	*4/07/2009*
c.	Was 26(a)(1) initial disclosure completed?	*4/30/2009*

2. DISCOVERY LIMITATIONS **NUMBER**

a. Maximum Number of Depositions by Plaintiff(s) *10*

b. Maximum Number of Depositions by each Defendant(s) and Third-party Defendant *10*

c. Maximum Number of Hours for Each Deposition *7 hours*
(unless extended by agreement of parties)

d. Maximum Interrogatories by any Party to any Party *25*

e. Maximum requests for admissions by any Party to any Party *50*

f. Maximum requests for production by any Party to any Party *50*

DATE

3. AMENDMENT OF PLEADINGS/ADDING PARTIES[1]

a. Last Day to File Motion to Amend Pleadings *09/30/2009*

b. Last Day to File Motion to Add Parties *09/30/2009*

4. RULE 26(a)(2) REPORTS FROM EXPERTS[2]

a. Plaintiff *01/08/2010*

b. Defendant *03/12/2010*

d. Counter reports: *04/16/2010*

5. OTHER DEADLINES

a. Discovery to be completed by:

Fact discovery *12/04/2009*

Expert discovery *06/25/2010*

b. *(optional)* Final date for supplementation of disclosures and discovery under Rule 26 (e) *00/00/00*

c. Deadline for filing dispositive or potentially dispositive motions and Daubert motions *07/30/2010*

6. SETTLEMENT/ ALTERNATIVE DISPUTE RESOLUTION

a. Referral to Court-Annexed Mediation *No*

b. Referral to Court-Annexed Arbitration *No*

c. Evaluate case for Settlement/ADR on *12/04/2009*

d. Settlement probability: ***Fair***

7. TRIAL AND PREPARATION FOR TRIAL.

a. Rule 26(a)(3) Pretrial Disclosures[3]

Plaintiff **11/05/10**

Defendant **11/19/10**

b. Objections to Rule 26(a)(3) Disclosures (if different than 14 days provided in Rule)

DATE

c. Special Attorney Conference[5] on or before **12/03/10**

d. Settlement Conference[6] on or before 12/03/10

e. Final Pretrial Conference 2:30 p.m. 12/17/10

f. Trial	Length	Time	Date
I. Bench Trial	*Four days*	*8:30 a.m.*	*01/04/11*
ii. Jury Trial	*n/a*		

8. OTHER MATTERS:

Counsel should contact chambers staff of the District Judge regarding Daubert and Markman motions to determine the desired process for filing and hearing of such motions. All such motions, including Motions in Limine should be filed well in advance of the Final Pre Trial. Unless otherwise directed by the court, any challenge to the qualifications of an expert or the reliability of expert testimony under Daubert must be raised by written motion before the final pre-trial conference.

Order regarding privilege claims:

1. An "Inadvertently Produced Document" is a document produced to a party in this litigation that could have been withheld, in whole or in part, based on a legitimate claim of attorney-client privilege, work-product protection, or other applicable privilege.
2. The parties agree that inclusion of any Inadvertently Produced Document in a production shall

not result in the waiver of any privilege or protection associated with such document, nor result in a subject matter waiver of any kind.

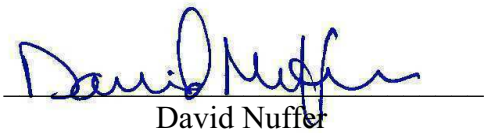
3. A producing party may demand the return of any Inadvertently Produced Document, which demand shall be made to the receiving party's counsel in writing and shall contain information sufficient to identify the Inadvertently Produced Document. Within five (5) business days of the demand for the Inadvertently Produced Document, the producing party shall provide the receiving party with a privilege log for such document that is consistent with the requirements of the Federal Rules of Civil Procedure, setting forth the basis for the claim of privilege for the Inadvertently Produced Document. In the event that any portion of the Inadvertently Produced Document does not contain privileged information, the producing party shall also provide a redacted copy of the Inadvertently Produced Document that omits the information that the producing party believes is subject to a claim of privilege.

4. Upon receipt of a written demand for return of an Inadvertently Produced Document, the receiving party shall immediately return the Inadvertently Produced Document (and any copies thereof) to the producing party and shall immediately delete all electronic versions of the document.

5. The receiving party may object to the producing party's designation of an Inadvertently Produced Document by providing written notice of such objection within five (5) business days of its receipt of a written demand for the return of an Inadvertently Produced Document. Any such objection shall be resolved by the Court after an in camera review of the Inadvertently Produced Document. Pending resolution of the matter by the Court, the parties shall not use any documents that are claimed to be Inadvertently Produced Documents in this litigation.

Dated this _5th_ day of ___May___, 2009.

BY THE COURT:



David Nuffer
U.S. Magistrate Judge

2. Counsel must still comply with the requirements of Fed. R. Civ. P. 15(a).

3. A party shall disclose the identity of each testifying expert and the subject of each such expert's testimony at least 60 days before the deadline for expert reports from that party. This disclosure shall be made even if the testifying expert is an employee from whom a report is not required.

4. Any demonstrative exhibits or animations must be disclosed and exchanged with the 26(a)(3) disclosures.

5. The Special Attorneys Conference does not involve the Court. Counsel will agree on voir dire questions, jury instructions, a pre-trial order and discuss the presentation of the case. Witnesses will be scheduled to avoid gaps and disruptions. Exhibits will be marked in a way that does not result in duplication of documents. Any special equipment or courtroom arrangement requirements will be included in the pre-trial order.

6. The Settlement Conference does not involve the Court unless a separate order is entered. Counsel must ensure that a person or representative with full settlement authority or otherwise authorized to make decisions regarding settlement is available in person or by telephone during the Settlement Conference.

FILED
U.S. DISTRICT COURT

2009 MAY -6 A 11: 31

DISTRICT OF UTAH
BY:_____
DEPUTY CLERK

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

JEFF MECHAM, Plaintiff, vs. UTAH STATE DEPARTMENT OF CORRECTIONS, a Utah governmental entity; JACK FORD; RICK JOHNSON; and JOHN DOES I-V, Defendants.	**ORDER GRANTING EXTENSION OF TIME TO RESPOND TO COMPLAINT** Case No. 2:09CV00149 Judge Clark Waddoups

Based on Defendants' *Motion to Extend Time to Respond to Complaint*, the Clerk of the Court hereby enters the following order:

Pursuant to DUCiv.R. 77-2(a)(2), Defendants' motion is GRANTED. Defendants shall file an answer or other response to Plaintiff's *Complaint* on or before May 28, 2009.

DATED this 6th day of May, 2009.

D. MARK JONES
Clerk of the Court
U.S. District Judge

FILED
U.S. DISTRICT COURT

2009 MAY -6 P 1:58

DISTRICT OF UTAH

BY: _____
DEPUTY CLERK

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

JEFF MECHAM, Plaintiff, vs. UTAH STATE DEPARTMENT OF CORRECTIONS, a Utah governmental entity; JACK FORD; RICK JOHNSON; and JOHN DOES I-V, Defendants.	**CORRECTED ORDER GRANTING EXTENSION OF TIME TO RESPOND TO COMPLAINT** Case No. 2:09CV00149 Judge Clark Waddoups

Based on Defendant Utah Department of Corrections' *Motion to Extend Time to Respond to Complaint*, the Court hereby enters the following order:

Defendant's motion is GRANTED. Defendant Utah Department of Corrections shall file an answer or other response to Plaintiff's *Complaint* on or before May 28, 2009.

Dated this 6th day of ~~June~~ May, 2008.

BY THE COURT:

CLARK WADDOUPS
United States District Court Judge

FILED
U.S. DISTRICT COURT
2009 MAY -6 P 3:58
DISTRICT OF UTAH
BY: DEPUTY CLERK

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Attorneys for Defendants
Mylan Pharmaceuticals, Inc.,
Actavis Totowa, LLC,
Mylan Bertek Pharmaceuticals, Inc.,
and UDL Laboratories, Inc.

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

BETTY CHANTRILL, Plaintiff, v. MYLAN PHARMACEUTICALS, INC., a West Virginia Corporation, ACTAVIS TOTOWA, LLC, ACTAVIS GROUP, hf., MYLAN BERTEK PHARMACEUTICALS INC.; and, UDL LABORATORIES, INC., and DOES 1-10, inclusive, Defendants.	**ORDER TO STAY PROCEEDINGS PENDING MULTIDISTRICT LITIGATION TRANSFER** Case No. 2:09-CV-00225 Judge Dee Benson MDL No. 1968

Considering the foregoing Motion to Stay Proceedings Pending the Transfer Order of the Multidistrict Litigation Court and incorporated Memorandum in Support filed on behalf of Defendants Mylan Pharmaceuticals, Inc., Actavis Totowa, LLC, Mylan Bertek Pharmaceuticals,

Inc., and UDL Laboratories, Inc.;

IT IS HEREBY ORDERED THAT the above-captioned proceedings are stayed pending transfer to the multidistrict litigation court in the United States District Court for the Southern District of West Virginia pursuant to the ruling of the Judicial Panel of Multidistrict Litigation.

DATED this 6th day of May, 2009

BY THE COURT:

Dee Benson

Hon. Dee Benson
UNITED STATES DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2007, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which sent notification of such filing to the following:

- **Steven R. Bangerter**
  bangerterlaw@infowest.com,kward@infowest.com,wfrazier@infowest.com

s/ Penny Berendson

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Attorneys for Plaintiff
Miche Bag, LLC

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

MICHE BAG, LLC, a Utah limited liability company, Plaintiff, v. SUSAN BOTHWELL, an individual, Defendant.	Civil Action No. 2:09-cv-00355-DAK **CONSENT JUDGMENT OF INFRINGEMENT AND PERMANENT INJUNCTION AS TO DEFENDANT SUSAN BOTHWELL** Honorable Judge Dale A. Kimball

WHEREAS Plaintiff Miche Bag, LLC ("Plaintiff" or "Miche Bag") and defendant Susan Bothwell ("Defendant" or "Ms. Bothwell") have agreed to settlement of the matter in issue between them and to entry of this judgment, it is ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

Findings of Fact

1. Plaintiff Miche Bag, LLC is a Utah limited liability company having its principal place of business in Riverton, Utah.
2. Defendant Susan Bothwell is an individual residing in Alto, Michigan.
3. Ms. Bothwell conducts business in this judicial district and the parties are competitors in the market for purses, handbags, and related goods and services.

4. Miche Bag is the owner of the trademark MICHE (United States Trademark Registration No. 3,528,628) for use in connection with purses, handbags, straps for purses and handbags, and removable decorative covers for purses and handbags. A true and correct copy of the certificate of registration is attached hereto as Exhibit A.
5. Since October 2007, Miche Bag has continuously and extensively promoted, offered and sold purses, handbags, straps for purses and handbags, removable decorative covers for purses and handbags, and related goods and services, in interstate commerce under the MICHE mark.
6. Miche Bag uses the MICHE mark in interstate commerce in connection with the sale and advertising of its products nationwide and throughout the world.
7. As a result of Miche Bag's continuous and extensive use of the MICHE mark, including advertising, labeling and marketing utilizing this mark, the MICHE mark has become an asset of substantial value to Miche Bag as a distinctive indication of the origin and quality of Miche Bag's products. Moreover, the MICHE mark serves to identify Miche Bag's goods and services and distinguish them from purses, handbags and related goods and services offered by others.

8. By using the MICHE mark, Miche Bag has developed significant and valuable goodwill in this mark.

9. Ms. Bothwell does not contest the distinctiveness and validity of the MICHE mark.

10. Miche Bag has not authorized Ms. Bothwell to use the MICHE mark in commerce in connection with purses, handbags, straps for purses and handbags, removable decorative covers for purses and handbags, and other related goods and services.

11. Ms. Bothwell recently began using the MICHE mark in commerce to offer for sale and sell, within the United States and within the State of Utah, handmade fabric covers for purses and handbags.

12. Ms. Bothwell uses the MICHE mark on goods and services in interstate commerce that are identical, or at least highly related, to Miche Bag's MICHE goods and services.

13. Ms. Bothwell's promotion and sales of her goods and services under the MICHE mark are directed to consumers of Miche Bag's MICHE goods and services and are conducted through the same channels of trade as are used by Miche Bag to promote and sell its MICHE goods and services.

14. Ms. Bothwell does not contest that her use of the MICHE mark in commerce infringes Miche Bag's rights in the MICHE mark.

15. Ms. Bothwell was aware of Miche Bag's MICHE mark and Ms. Bothwell committed her acts of infringement in willful and flagrant disregard of Miche Bag's lawful rights.

16. The handmade fabric covers for purses and handbags, as offered for sale and sold by Ms. Bothwell, compete directly with goods and services offered by Miche Bag under the MICHE mark.

Conclusions of Law

17. The MICHE mark is a distinctive, valid, and protectable trademark of Miche Bag.

18. Ms. Bothwell's use of the MICHE mark in connection with her goods and services is likely to cause confusion, deception and/or mistake within the marketplace, the relevant industry, and all channels of trade for Miche Bag's MICHE goods and services.

19. Ms. Bothwell's use of the MICHE mark in connection with her goods and services is likely to cause confusion, to cause mistake, or to deceive customers and potential customers as to the source of Ms. Bothwell's goods and services, as to an affiliation or connection between Miche Bag's MICHE goods and services and Ms. Bothwell's goods and services, as to an affiliation or connection between Miche Bag and Ms. Bothwell's goods and services, or as to Miche Bag's approval, endorsement, or sponsorship of Ms. Bothwell's goods and services.

20. Ms. Bothwell's use of the MICHE mark in connection with her goods and services is likely to injure the business reputation of Miche Bag.

21. Pursuant to 15 U.S.C. § 1116, Miche Bag is entitled to an injunction prohibiting Ms. Bothwell, her agents and servants, and any and all parties acting in concert with any of them from advertising, marketing, and otherwise conducting business utilizing the MICHE mark in connection with purses, handbags, straps for purses

and handbags, removable decorative covers for purses and handbags, and other related goods and services.

22. The MICHE mark protects unique and distinctive goods and services offered by Miche Bag.

23. Miche Bag has marketed, advertised, and promoted its unique goods and services using the MICHE mark, and as a result of this marketing, advertising, and promotion, the MICHE mark has come to mean and is understood to signify the goods and services of Miche Bag, and the MICHE mark is the means by which Miche Bag's goods and services are distinguished from the goods and services of others in the same field.

Order

24. This Court has jurisdiction over each of the parties in this action and over the subject matter in issue. The Court further has continuing jurisdiction to enforce the terms and provisions of this Consent Judgment of Infringement and Permanent Injunction. Venue is proper in this Court.

25. Ms. Bothwell, her agents, officers, servants, employees, representatives, attorneys and assigns, and all other persons, firms, or companies in active concert or participation with them are hereby permanently enjoined and restrained, unless specifically authorized by Miche Bag, from directly or indirectly engaging in any of the following activities:

a. Using the MICHE mark or any confusingly similar mark in any way or using any word, words, phrases, symbols, logos, or any combination of words or symbols that would create a likelihood of confusion, mistake, or deception therewith, including, without limitation, the phrase "Fits Miche Bag", in connection with or in the marketing,

offering, selling, disposing of, licensing, leasing, transferring, displaying, advertising, reproducing, developing, or manufacturing of goods and/or services in commerce;

b. Maintaining any materials in their possession or under their control that contain infringements of, or things likely to cause confusion with, the MICHE mark;

c. Unfairly competing with Miche Bag in any manner whatsoever;

d. Doing any other act likely to induce the mistaken belief that Ms. Bothwell or her goods, services, or commercial activities are in any way affiliated, connected, or associated with Miche Bag or its goods, services or commercial activities;

e. Causing likelihood of confusion, injury to Miche Bag's business reputation, or diminishing the distinctiveness of Miche Bag's MICHE mark, symbols, labels, or other forms of advertisement;

f. Committing trademark infringement, false advertising, false designation of origin, false descriptions, unfair competition, and/or interference with prospective economic advantage and/or any other act or making any other statement that infringes Miche Bag's trademarks or constitutes an act of infringement, unfair competition, untrue and misleading advertising, and/or interference with prospective economic advantage, under federal law and/or the laws of the State of Utah; and

g. Assisting, aiding, or abetting any other person or business entity in engaging in or performing any of the activities referred to in the above paragraphs (a) through (f).

26. In the event Ms. Bothwell breaches any term of this Consent Judgment of Infringement and Permanent Injunction, or otherwise infringes Miche Bag's trademark rights, Miche Bag shall be entitled to injunctive relief, damages, and profits, and Ms. Bothwell shall pay Miche Bag's attorneys' fees

and costs incurred as a result of such infringement and/or breach, including investigative costs incurred in the discovery of such infringement and/or breach.

27. Ms. Bothwell agrees that the federal or state courts in Utah shall have personal jurisdiction over Ms. Bothwell in any dispute involving this Consent Judgment of Infringement and Permanent Injunction and any future violation of Miche Bag's trademark rights.

28. Service by mail upon Ms. Bothwell, addressed to Susan Bothwell at 7012 McCords, Alto, Michigan 49302, of a copy of this Consent Judgment of Infringement and Permanent Injunction entered by the Court is deemed sufficient notice to Ms. Bothwell under Rule 65 of the Federal Rules of Civil Procedure. It shall not be necessary for Ms. Bothwell to sign any form of acknowledgement of service.

29. The permanent injunction shall remain in full force and effect until modified by order of this Court.

30. The parties shall bear their own fees and costs for this action.

IT IS SO ORDERED

Dated: May 6, 2009

Honorable Dale A. Kimball
United States District Judge

APPROVED AS TO FORM AND CONTENT:

Dated this ____ day of April, 2009.

_____
James B. Belshe
Seth W. Black
WORKMAN | NYDEGGER
1000 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111

Attorneys for Plaintiff
Miche Bag, LLC

Dated this ____ day of May, 2009.

_____
Susan Bothwell
7012 McCords
Alto, Michigan 49302

Defendant

PROOF OF SERVICE

I hereby certify that on May 6, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, and sent notification of such filing to the following via U.S. Mail:

Susan Bothwell
7012 McCords
Alto, MI 49302

WORKMAN NYDEGGER

By: /s/ James B. Belshe
James B. Belshe